IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY
&
THE HONOURABLE MRS. JUSTICE K.HEMA

MONDAY, THE 22ND OCTOBER 2007 / 30TH ASWINA 1929

CRL.A.No. 11 of 2004(B)

SC.37/2003 of ADDL.SESSIONS COURT-II, KOZHIKODE
.....

APPELLANT: ACCUSED

UMMERKOYA,S/O.ABDULLA HAJI,
AGED 48 YEARS,THATTARAKAVIL VEEDU,
THALAKULATHOOR AMSOM AND DESOM IN
KOZHIKODE TALUK - PRISONER,
CENTRAL JAIL,CANNANORE.

BY ADV. ADV.SREEPRAKASH K NAIR(STATE BRIEF)

RESPONDENTS: COMPLAINANT

STATE,REP.BY THE SUB-INSPECTOR OF POLICE
ELATHUR POLICE STATION,
(CR.NO.5/2001).

BY PUBLIC PROSECUTOR SRI.NOBLE MATHEW

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 22/10/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J.B.KOSHY & K.HEMA,JJ.

CRL.A.NO. 11 OF 20O4

Dated this the 22nd day of October, 2007

JUDGMENT

Koshy, J.

Appellant-accused was alleged to have murdered his wife by cutting her neck at between 6.45 a.m and 7 a.m on 15.1.2001. There was no eye witness to the incident. The prosecution tried to prove the guilt of the accused by relying on circumstantial evidence. The trial court was of the opinion that it was proved beyond reasonable doubt that the accused is guilty of murder and the chain of circumstances is complete in arriving at a conclusion that the accused alone has committed the murder.

2. First we shall consider the medical evidence to find out whether the death was homicide or suicide. PW12, Assistant Prof. Forensic Medicine, Medical College Hospital, Calicut conducted the postmortem examination. Exhibit P4 is the postmortem certificate. PW12 noted the following antemortem injuries:

> "1. Incised wound 2.5 x 0.5 x 1 cm on left side of front of lower jaw transverse 0.3 cm below lip margin just to left of midline. Jaw bone underneath was cut 0.1 cm deep. The wound was directed slightly downwards.

2. Incised wound 8 x 2 x 2.5 cm on front of neck transverse right end 3.5 cm to right of midline left end 6 cm below left angle of jaw; muscles, blood vessels trachea oesophagus were bisected vertebra at (5-6 junction) was cut for a depth of 2 cm. Multiple superficial linear incisions extended from right end of injury No.2 for a length of 10 cm (0.5 -1 cm) in straight line, transversely.

3. Incised wound 7.5 xz 1.5 x 2.5 cm transverse 2 c.m below lower margin of injury No.(2), 1 cm above left collar bone right end at mind line. An incised wound 1.5 x 0.5 x 0.5 cm present on right side of front of chest, transverse, 4 cm to right of injury No.3 and the line with it a linear superficial incision extended transversely on the left end of the injury. Thyroid garland underneath was cut for a depth of 1 cm.

4. Incised wound avulsed 14 x 5 x 5 cm transverse across back of left shoulder right end at midn line the muscle underneath was cut, cut the shoulder blade and entered shoulder joint. A linear superficial incision 8 cm extended downwards and right from right end of injury with an incised wound 1 x 0.5 x 0.6 cm transverse at the end of it. (4 cm below right shoulder). A superficial linear incision present 1.6 cm below first one parallel to it (6 cm) superficial linear incised wound 2.5 cm oblique on left half of back of neck lower right end at mid line 3.5 cm above injury No.4.

5. Incised wound 4 x 1 x 3 cm transverse over left shoulder blade 2.5 cm below injury no.4. Right end was 6.5 cm away from mid line, sharp cut and left ened found rounded with abraded margines.A linear abrasion 6.5 cm extended from right end of injury to right.

6. Incised wound 4 x 1.5 x 1.5 cm transverse on top of left shoulder 1.5 cm above injury No.4, 4 cm

> away from neck. Upper margin bewelled. Abrasion 4.5 cm x 2 cm present. 2 cm to left of the injury. Back margin showed a superficial incision. Contused abrasion 2 x 2 x 1 cm in front of previous injury. Multiple contusions over an area 3 x 1.5 cm on left side of lower jaw 3 cm away from midline."

PW12 clearly deposed that death was due to cut injury in the neck. He also deposed that all cut injuries noted by him could be caused by cutting by a weapon like MO1. Considering the evidence in this case, antemortem injuries and the nature of cut injuries, it can be seen that it is a case of homicide. The deceased was murdered by inflicting cut injuries on the neck and other parts of the body by using a weapon like MO1.

3. The evidence in this case undisputedly shows that the body of the deceased was found in her house where she, her husband and two children were residing. PW4 is the daughter of the accused and deceased. She was aged 13 at the time of incident and when she was examined, she was aged 15. She stated that she loves his father, the accused and mother, the deceased. She stated that on the previous date of incident she, her mother, father and her brother were there in the night and after having food at about 8.30 p.m, they slept. She also stated that mother woke up her brother and they went to the Madrasa at 6.30 a.m. So, after 6.30 AM children

were not in the house. According to the prosecution, after 6.30 AM only the incident occurred. She also stated that from the Madrasa her cousin told her that something happened in her house and they went to the house of father's brother. Later from there they were brought to the house and they saw the dead body of their mother. Of course, as against the 161 statement, she deposed that before they left for Madrasa, father went to mosque for prayers and therefore she was declared hostile and prosecution was allowed to cross examine her. Her evidence would show that accused, deceased, her younger brother and she were in the house on the previous night and they slept together in that house. According to her deposition, she and her brother left house for Madrasa at 6.30 a.m on the date of alleged incident. She also stated that on the way to Madrasa she and her younger brother took daughter of PW2 also to Madrasa. As far as PW4 is concerned, any way their mother is lost and it is natural that she wants atleast her father is saved. PW2 is a neighbour. She also stated that the children of deceased came to her housoe at 6.45 a.m to take her brother's child to the Madrasa. She did not say anything about the incident happened in the house at that time.

4. PW3 is the brother of the accused. He stated that he was living only 10 to 40 feet away from the house of the deceased. So, they were living at an audible distance. He also stated that he used to go mosque early morning and come back at 7.30 a.m. Prayer time is only 15 minutes. He also stated that his brother accused had a job in ration shop, apart from job of brokerage etc. He denied Section 161 police statement that on the way back from the mosque his brother told him that he murdered his wife. Therefore, he was declared hostile and prosecution was allowed to put questions to him. He also stated that the son of the deceased is staying with him and he came to the court along with PW2 neighbour and PW4 daughter of the deceased. He further stated that he saw the dead body at 8 'O' clock. But he stated that he did not enquire why it happened. Her evidence is not reliable and against the ordinary human conduct. He also stated that he did not enquire about the accused or children at that time and he stood there only 6 to 7 minutes. At 12.30 p.m when the body was taken to the hospital, he also accompanied and he never tried to inform the accused regarding the death. He further stated that his another brother, who is a police constable, came to his house at 10 'O' clock and talked about the incident. In cross-examination by the accused it is stated

that accused used to come to Mosque and after the prayer he also read Quran and thereafter he used to go to ration shop. He further stated that on that day he saw the accused in the mosque, but he did not say when and at what time he saw the accused in the mosque. The prosecution brought to the notice that according to PW3, immediately the accused left the mosque to ration shop, but the ration shop will not be opened so early in the morning. PW6 deposed that MO1 was purchased from his shop on 12.1.2001 by the accused. He also stated that price of MO1 was Rs.48/-. He stated that the accused gave Rs.28/- as advance and he promised to give the balance later. He further stated that the accused purchased MO1 while returning from the ration shop in the night. In cross examination there is no suggestion hat PW6 is inimical to the accused. PW8, another neighbour was also declared hostile and he stated that he did not state to the police that the accused murdered the deceased. According to him, he went for work at 8 'O' clock and at that time he was not aware of the death and he further stated that he never went to the house of the accused, but in the cross examination by the prosecutor with permission of the court, he stated that in the chief examination he stated falsely that he never gone to the house, but used to go to the house only when the

accused was present. He stated that he is in good terms with the accused and after he was released on bail he talked with him. His evidence is not supporting the prosecution or defence.

5. Another important evidence regarding the incident connecting the accused is that he surrendered before the police station and the lunki which the accused was wearing at that time had blood stained. Exhibit P2 is the seizure mahazar which shows that when he surrendered the police station, a kallimundu/lunki which he was wearing was taken by the police and he was given another dress for wearing. He was also wearing a shirt at that time. Exhibit P8 arrest memo and Exhibit P9 inspection memo support the same. Exhibit P2 is prepared on the same day of incident and thereafter PW10 altered Exhibit P2 mahazar. The chemical analysis report, Exhibit P11 shows that kailimundu of accused was stained with human blood. PW8 mahazar witness told that he signed the mahazar. On the basis of the disclosure made by him, MO1 Koduval was found out from the rack in the house of the accused. Exhibit P3 is the seizure mahazar. Recovery of MO1 koduval at the confession of the accused is admissible under Section 27 of the Evidence Act. Exhibit P11 chemical examination report shows that it was stained with human blood of group 'A'. Both MO2 kallimundu and MO1

koduval were stained with human blood of group 'A'. The dresses of the deceased were stained with 'A' group blood.

6. Defence of the accused was that at 5.30 a.m he went to the mosque for prayers. According to him, after prayer and after reading Quran he used to go to his work place. Therefore he pleaded alibi. But it is the settled law that burden to prove alibi is very heavy and if alibi is pleaded and not proved, that will be an additional circumstance against the accused. In this case he did not examine any independent witness who was attending prayers in the mosque after 6.30 AM and before 7.30 AM or anybody from the ration shop to prove the fact that he attended prayer in the mosque and he went to the ration shop for his work at the early morning. There is also no evidence to that effect. It is true that PW3, brother of the accused stated that he saw the accused in the mosque. But he did not say that when he saw the accused in mosque. But in the absence of any independent evidence, her plea of alibi cannot be believed. In ***Binay Kumar Singh v. State of Bihar*** (1997 SCC (Crl) 333) it is held that strict proof is required for establishing the plea of alibi. In ***Rajesh Kumar v. Dwaramvir and others*** (1997 SCC (Crl) 891) it is held that plea of alibi must be proved with absolute certainty so as to completely exclude the presence of the person

concerned at the time when and the place where the incident took place.

7. The Supreme Court in ***Trimukh Maroti Kirkan v. State of Maharashtra*** (2006(4) KLT 686 - JT 2006(9) SC 50) after referring to the decision reported in ***State of Punjab v. Karnail Singh*** (2003)11 SCC 271) and ***Collector of Customs, Madras & Ors. v. D.Bhoormull*** (AIR 1974 SC 859) held that when the offence is taking place inside the privacy of a house, the burden of prosecution is not heavy as is required in other cases of circumstantial evidence. After initial burden of establishing the case, it is for the accused to explain the circumstances to prove the defence. It was held as follows:

> "Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence took place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime.."

In Raj Kumar Prasad Tamarkar v. State of Bihar & Anr. (JT 2007(1) SC 239) it is held as follows:

> "Once the prosecution has been able to show that at the relevant time, the room and terrace were in exclusive occupation of the couple, the burden of proof lay upon the respondent to show under what circumstances death was caused to his wife. The onus was on him. He failed to discharge the same."

The above principle was laid down by the Supreme Court a quarter of century ago in ***Nika Ram v. The State of Himachal Pradesh*** (AIR 1972 SC 2077). The above decision was followed in ***Swamy Shraddananda @ M.M.Mishra v. State of Karnataka*** (2007 (8) SCAKE 1).

> "36. If it is proved that the deceased died in an unnatural circumstance in her bed room, which was occupied only by her and her husband, law requires the husband to offer an explanation in this behalf. We, however, do not intend to lay down a general law in this behalf as much would depend upon the facts and circumstances of each case. Absence of any explanation by the husband would lead to an inference which would lead to a circumstance against the accused."

In this case, as deposed by PW4 daughter of the accused, the accused, deceased, PW4 and her brother were living in that house. They slept together after taking food at 8.30 pm and she left at 6.30 am from house to the mosque along with her brother. So, it is for him to explain what happened in his house. Even in 313 statement there is no explanation or reference about any other inimical person. There is no evidence of theft also. The motive or quarrel between

the husband and wife cannot be proved precisely by the prosecution. But considering the other circumstances that they were living together in the house, they were sleeping together on that day, purchase of MO1 koduval from PW6, recovery of MO1 koduval at the instance of the accused, which is admissible under Section 27, the fact that his kallimundu had blood stained and blood found on MO1 koduval and MO2 kallimundu owned by the accused and dress of deceased are of group B show that the accused is guilty and nobody else is guilty. All links in the chain of circumstance are proved beyond reasonable doubt. In the above circumstances, we find that no interference is required in the conviction entered into by the Sessions Court. Only minimum sentence under Section 302 was imposed. Therefore, regarding sentence also no interference is required. The appeal is dismissed.

J.B.KOSHY, JUDGE

K.HEMA, JUDGE

vgs.

J.B.KOSHY & K.HEMA, JJ.

Crl.A.NO.11 OF 2004

JUDGMENT

22.10.2007